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No. 84-6470

In The

Supreme Court of the United States

October Term, 1985

ROBERT DAVIDSON,

Petitioner,

v.

JOSEPH CANNON and
ROBERT JAMES,

Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Third Circuit erred in holding that petitioner, a state prisoner, had a constitutionally protected liberty interest in being free from a single assault by another prisoner?

2. If petitioner did have a constitutionally protected liberty interest, whether the Court of Appeals properly held that respondents' mere negligence did not rise to the level of a deprivation of that interest?

3. If respondents' simple negligence was sufficient to deprive petitioner of a protected liberty interest, whether that deprivation was a deprivation with procedural due process, despite an immunity provided by state law, and therefore not in violation of the Fourteenth Amendment?

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STATEMENT OF THE CASE

This is a civil rights action brought by petitioner Robert Davidson, a state prisoner, against Joseph Cannon and Robert James, two prison officials, pursuant to 42 U.S.C. §1983 (J.A.5; J.A.83). Petitioner claims that respondents violated his Eighth and Fourteenth Amendment rights by failing to adequately protect him after he informed them of a threat made against him by another prisoner (J.A.8).

According to the findings of fact in the district court, based on the testimony at trial, on Friday, December 19, 1980, a state prisoner named McMillian told petitioner, "I'll fuck you up you old mother-fucking fag. Go up to your cell, I be right there" (J.A.85; J.A.98). Petitioner told Officer Jose Garcia of the threat and then, at Garcia's suggestion, wrote a note about the threat (J.A.85; J.A.98-J.A.99). Petitioner candidly testified that he did not write the note because of any concern for his own safety (J.A.75), but rather to exonerate himself "if" further trouble developed between himself and McMillian (J.A.75; J.A.82; J.A.85). Petitioner did not request protective custody or any other protective measures (J.A.85).

Officer Garcia took the note to respondent Joseph Cannon, Assistant Superintendent (J.A.41; J.A.86). Cannon, who had known petitioner since the early 1960's, interpreted petitioner's actions in reporting the incident to Officer Garcia rather than to Cannon himself as meaning that petitioner was seeking exoneration, not protection (J.A. 42). That interpretation was, according to petitioner's own testimony, absolutely correct. Nevertheless, Cannon instructed Garcia to take the note to respondent Robert James in Internal Affairs for investigation (J.A.45; J.A.86). When Garcia arrived at James' office, James was in the midst of investigating a report that another inmate had a shank in his cell and had stabbed someone

(J.A.51). Although Garcia verbally informed James that the note concerned a threat against petitioner, he did not indicate any urgency about the note (J.A.50-J.A.51; J.A.86). James left the folded note on his desk, unread, because of the shank crisis (J.A.51; J.A.86-J.A.87). When James finished his shift at 4 p.m., he worked a second shift in another capacity, as Assistant Center Keeper, dealing with a variety of situations and problems (J.A.54; J.A.87). When James left the prison at 10:30 p.m., he forgot about the unread note on his desk back in Internal Affairs (J.A.59; J.A.87). If he had remembered it, he would have posted it in the Center to alert officers on the next shift (J.A.59-J.A.60; J.A.87).

Neither Cannon nor James worked on the weekend of December 20 and 21, 1980 (J.A.47-J.A.48; J.A.87). On Sunday morning, December 21, 1980, McMillian, contrary to petitioner's own expectations, carried out his threat, stabbing petitioner with a fork and breaking his nose (J.A.75; J.A.87).

The district court, after a non-jury trial, concluded that petitioner had not established a claim of cruel and unusual punishment in violation of the Eighth Amendment "because respondents did not act with deliberate or callous indifference to petitioner's needs and because the incident complained of was a single attack" (J.A.89). However, the district court did find that respondents deprived petitioner of a protected liberty interest without due process of law, in violation of the Fourteenth Amendment (J.A.-89-J.A.94). First, the court identified a cognizable liberty interest in remaining free from physical attack (J.A.89). Then the court concluded that respondents deprived petitioner of that liberty interest even though their failure to protect petitioner was merely negligent. The court inter-

preted *Parratt v. Taylor*, 451 U.S. 527 (1981) as holding that negligence is sufficient to constitute a deprivation for purposes of 42 U.S.C. §1983 and applied *Parratt*, a property case, to petitioner's liberty interest. Finally, the court concluded that respondents' deprivation of petitioner's liberty interest was without procedural due process because N.J. Stat. Ann. 59:5-2(b) (4) prevented petitioner from recovering monetary damages from respondents (J.A.91-J.A.92). N.J. Stat. Ann. 59:5-2(b) (4) provides in pertinent part, "Neither a public entity nor a public employee is liable for . . . any injury caused by . . . a prisoner to any other prisoner. . . ." Judgment was entered in favor of petitioner, awarding him $2,000 in compensatory damages (J.A.93).

The United States Court of Appeals for the Third Circuit, en banc, reversed (J.A.123). Speaking through Circuit Judge Sloviter, the court affirmed the district court's determination that petitioner had a liberty interest in bodily integrity (J.A.104). The court also affirmed the district court's findings that respondents were negligent because Cannon, although he followed the established procedure in directing petitioner's note to James, "simply failed to follow up" and James, "who was operating under a double shift burden, merely forgot to investigate a prisoner's note, which was ambiguous as to the nature of the threat, and conveyed no sense of urgency" (J.A.102; J.A.120). However, the court stated that "[t]he essential element of a §1983 action is abuse by a state official of his or her official position" (J.A.115). Consequently, the court held, "When the only finding is that of mere negligence, as here, we cannot find the 'outrageousness' or abuse of official power that warrants raising the tortious conduct of the prison official[s] to the level of a

deprivation of [a] constitutional right within the scope of §1983" (J.A.120). Having found no "deprivation" of petitioner's liberty interest in the first instance, the court rejected petitioner's claim that he was deprived of his liberty interest without procedural due process based on the immunity provided by N.J. Stat. Ann. 59:5-2 (J.A.121-J.A. 122).

In a concurring opinion, Circuit Judges Garth and Weis agreed with the majority that respondents' mere negligence did not constitute a deprivation of petitioner's liberty interest (J.A.123). However, they went further in opining that even if respondents' mere negligence could constitute a deprivation of petitioner's liberty interest, that deprivation was not without procedural due process and therefore did not violate the Fourteenth Amendment (J.A.123-J.A.124). Recognizing the immunity provided to respondents by state statute for petitioner's claim, the concurrence urged a balancing test to determine whether procedural due process is nevertheless afforded (J.A.124). Balancing the state's strong interests in preserving prison order and safety and in protecting from liability prison officials faced with such difficult tasks against a prisoner's desire to obtain money for injury suffered from a negligent failure to protect him from assault by another prisoner, the concurrence struck the balance in favor of respondents (J.A.126). Thus, petitioner "has had all the process which is his due" (J.A.126).

In three separate dissents Circuit Judges Seitz, Gibbons and Higginbotham would have affirmed, essentially for the reasons set forth in the district court's opinion (J.A.129; J.A.162; J.A.172).

This Court granted a writ of certiorari on June 3, 1985.

SUMMARY OF ARGUMENT

Although the Court of Appeals for the Third Circuit erred in holding that petitioner had a liberty interest in remaining free from a single assault by another prisoner, the court properly concluded that respondents' negligent conduct was not sufficient to deprive petitioner of that liberty interest. Furthermore, even if negligent conduct would support petitioner's claim of a deprivation of his liberty interest, that deprivation was not without due process and therefore did not violate the Fourteenth Amendment. Consequently, respondents submit that the judgment of the Third Circuit should be affirmed.

Petitioner boldly asserts, without analysis, that the court below correctly held that he had a liberty interest in remaining free from physical assault. If petitioner had been assaulted by respondents themselves, or if respondents had stood by and watched the assault without taking action, or if respondents had encouraged or acquiesced in the assault, respondents would agree that petitioner had a liberty interest. But those are not the facts. Respondents urge this Court to determine that a prisoner's liberty interest is not so broad as to encompass a single assault by another prisoner in the absence of the foregoing circumstances. Furthermore, if this Court decides that petitioner's liberty interest is as broad as he claims, that was not the clearly established law at the time of the

incident. Therefore, respondents are entitled to qualified immunity.

In any event, even if petitioner did have a liberty interest here, the court of appeals correctly held that he was not deprived of that interest because respondents were merely negligent. The question of whether negligence will support a due process claim under 42 U.S.C. §1983 has never been determined by this Court. Although there was reference to negligent conduct in *Parratt v. Taylor*, 451 U.S. 527 (1981), a determination of the defendant's state of mind was not essential to the decision in that case. Regardless of the defendants' state of mind there was no constitutional violation because the available state remedy adequately met due process requirements. *Hudson v. Palmer*, — U.S. —, 104 S.Ct. 3194 (1984), reaffirms that view.

In any event, this Court can, and should, decide now that negligence will not support a due process claim under §1983; i.e. that there is no constitutional right to be free from an official's simple mistakes. That would be consistent with the legislative history of §1983, which was enacted to remedy abuses of official power, not mere negligence. It would also be consistent with decisions by many courts of appeals, even since *Parratt*, which held that conduct must be worse than negligent to rise to the level of a constitutional deprivation.

Finally, even if petitioner did have a liberty interest, and even if respondents' negligence did deprive him of that interest, that deprivation was not without due process. Petitioner asserts that the immunity provided to respondents by N.J. Stat. Ann. 59:5-2(b)(4) for an injury caused by one prisoner to another automatically deprives him of

due process. An immunity is not a *per se* denial of due process, as the viability of judicial immunity, for example, amply demonstrates. Instead, if the immunity is reasonable, not irrational or arbitrary, when balanced against the prisoner's interest in recovering money, the immunity satisfies due process requirements. The concurring opinion below engaged in just such a balancing test and decided that it favored respondents. This Court is urged to adopt that reasoning.

For any one of the three reasons cited above -- the absence of a liberty interest, the absence of a deprivation, or the absence of a denial of due process -- the judgment of the court of appeals should be affirmed.

ARGUMENT

POINT I

PETITIONER, A STATE PRISONER, HAD NO CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN BEING FREE FROM A SINGLE ASSAULT BY ANOTHER PRISONER.

The district court found that petitioner had a liberty interest protected by the due process clause in remaining free from physical attack and injury and "free of personal violence" (J.A.89). In so holding, the court relied primarily on *Ingraham v. Wright*, 430 U.S. 651 (1977), and *Youngberg v. Romeo*, 457 U.S. 307 (1982) (J.A.90). The court of appeals framed the issue as follows:

> whether plaintiff as a state prisoner had a constitutionally protected 'liberty interest' in security from physical assault by fellow prisoners [J.A.103].

The court of appeals answered that question in the affirmative, primarily on the basis of *Ingraham* and *Youngberg*.

Petitioner asserts, without analysis, that the district court and the court of appeals correctly held that petitioner had "a liberty interest in not being subjected to a physical assault" (Pet. 9). Respondents have consistently disagreed for two reasons. First, the courts below erred as a matter of law in finding a liberty interest under the specific facts of this case. Alternatively, if the courts below correctly held that petitioner had a liberty interest here, that was not the established state of the law at the time of the incident and thus respondents are entitled to a qualified good faith immunity pursuant to the Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In either event, this Court should affirm the judgment for respondents.

A. The Scope Of A Prisoner's Liberty Interest In Remaining Free From Physical Attack Is Not So Broad As To Encompass A Single Assault By Another Prisoner.

A liberty interest is the "right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." *Ingraham*, 430 U.S. at 673.* Although the contours of the term "liberty interest" have not been precisely defined, *ibid.*, a liberty interest has "always been thought to encompass freedom from bodily restraint and punishment." *Id.* at 673-674, citing *Rochin v. California*, 342 U.S. 165 (1952). However, prisoners, such as petitioner, "retain only a narrow range of protected liberty interests." *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 869 (1983). A prisoner has a right to be free from direct attack by the prison guards themselves. *Johnson v. Glick*, 481 F.2d 1035 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973). A pris-

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* Petitioner had the right to seek judicial relief for the assault by suing the person who intentionally assaulted him, fellow-prisoner McMillian.

oner also has been found to have a right to be free from attack by another prisoner where prison officials allegedly stood by while plaintiff was repeatedly attacked without provocation by another inmate wielding a home-made knife, resulting in the loss of sight in one eye. *Curtis v. Everett*, 489 F.2d 526 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974). But there are limits on the scope of a prisoner's right to protection of his bodily integrity against assault by another prisoner.

The court of appeals recognized that the issue was "whether the liberty interest in bodily integrity protected by the Fourteenth Amendment covers the state's failure to prevent attacks by other prisoners . . ." (J.A.104). In answering that question affirmatively the court relied primarily on *Youngberg v. Romeo*, 457 U.S. 307 (1982) (J.A. 105). To rely on *Youngberg* to find a liberty interest here is to disregard the crucial issue of identifying the contours of a liberty interest because the two cases are so very different. First of all, *Youngberg* concerned a patient in a mental hospital, not a state prisoner. Second, Romeo's liberty interest claim was a claim to safe conditions. *Id.* at 315. He was not complaining about a single attack by another patient but about something much more pervasive, namely sustaining injuries on 63 occasions over a two year period as a result of his own violence and that of other patients. The deliberate indifference of the officials in allowing those obviously unsafe conditions to exist for such a long period of time was clear. Consequently, the Court held that since the conditions of which Romeo complained would amount to cruel and unusual punishment in violation of the Eighth Amendment if they occurred in a prison setting, those conditions must, *a fortiori*, be unconsti-

tutional for an involuntarily committed mental patient, who may not be punished at all. *Id.* at 315-316. In the present case, which does concern a prisoner, the district court expressly concluded that there was no Eighth Amendment violation, a conclusion which has never been challenged. In other words, Romeo's liberty interest claim was quite different in nature from the liberty interest claimed by petitioner. Romeo's claim fell within the contours of a protected liberty interest. The question of whether petitioner's claimed liberty interest also falls within those contours certainly cannot be answered by relying on a case as different as *Youngberg*.

Likewise, the question of whether petitioner had a protected liberty interest is not answered by *Ingraham v. Wright*, 430 U.S. 651 (1977), the other case relied on by the district court, directly, and by the court of appeals, indirectly. In *Ingraham* the issues before the Court concerned the use of corporal punishment by school officials on students in public schools. *Id.* at 653. The specific acts were described as follows:

> Ingraham was subjected to more than 20 licks with a paddle while being held over a table in the principal's office. The paddling was so severe that he suffered a hematoma requiring medical attention and keeping him out of school for several days. Andrews was paddled several times for minor infractions. On two occasions he was struck on his arms, once depriving him of the full use of his arm for a week. [*Id.* at 657].

The holding in *Ingraham* is that a public school child has a liberty interest in being free from deliberate restraint and infliction of painful physical punishment by the school officials themselves. That is a far cry from this case. Assuming *arguendo* that lawfully arrested, convicted

and incarcerated state prisoners have the same liberty interest in being free from "unjustified intrusions on bodily integrity" as do public school children, *Ingraham* suggests only that the unjustified intrusion must be a deliberate act by the public officials themselves in order to come within "the contours of this historic liberty interest." This interpretation of *Ingraham* is supported by the Court's reliance on *Rochin v. California*, 342 U.S. 165 (1952). *Rochin*, involved governmental conduct that, in the famous formulation of Mr. Justice Frankfurter, "shocked the conscience." The Court in *Rochin*, like the Court in *Ingraham*, found the contours of a liberty interest to include unjustified intrusions by deliberate acts of government officials themselves. Neither case stands for the broader proposition urged by the courts below, namely that a liberty interest in bodily integrity extends so far as to include a single attack on a prisoner by another prisoner in the absence of participation or acquiescence in the assault by government officials. Indeed, no court before now has ever expanded the contours of a prisoner's liberty interest to encompass such an incident.

Respondents' view is consistent with the Court's interpretation of the Constitution as a charter of negative, not positive, liberties. *See Harris v. McRae*, 448 U.S. 297 (1980). The Bill of Rights was an attempt to ensure the right to be left alone, not the right to receive protective services.

> The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services. [*Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 1325 (1984)].

Cf. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (liberty "includes a freedom from all substantial arbitrary impositions and purposeless restraints").

This focus on negative, not positive, liberties has been disregarded by petitioner and the courts below. Petitioner argues that "[w]hen the state takes a citizen into custody, taking away his power to protect himself, it assumes responsibility for his safety" (J.A.9). Petitioner overstates the matter. He was not merely taken into custody, he was tried, convicted and sentenced to prison. Second, petitioner could have requested protective custody or other protective measures. He did not. Although he reported the threat, he himself did not expect it to be carried out and did not communicate any such expectations to respondents. Should he now be able to claim a liberty interest in being free from assault because he informed the officials of what he himself did not even consider to be a real threat and because he was not protected from that which he did not feel the need to be protected from? Respondents think not. An official's responsibility for a prisoner's safety does not extend that far.

To rule otherwise is literally to open the floodgates to inmate litigation. Here, the prison had a system for dealing with inter-prisoner threats. Assuming that petitioner invoked that system by writing the note, even though he did not anticipate, much less convey an anticipation of, an assault, the system simply did not work perfectly. Given the fallibility of mankind, the state cannot be expected to create and operate a system without any flaws. Furthermore, if the key to a prisoner's success in assert-

ing deprivation of a liberty interest is proof of bodily injury caused by the failure of the officials to protect him after receiving notice of a potential problem, the variations on that theme are endless. For example, suppose a prisoner notices that a bookcase in the prison's law library is unsteady and tottering. He reports that to the librarian, a state official, but the situation is not corrected. Thereafter, the same prisoner is injured when that very bookcase topples over on him. It is difficult to distinguish that case from this one. In fact, in that case the injured prisoner would not even have another person, such as McMillian, whom he could sue. If it is determined that there is a liberty interest here, why would there not be one there? Prison officials would become absolute insurers of the safety of inmates, at least where there is "notice." Surely that was not the intent of the Due Process Clause.

Consequently, respondents urge this Court to decide that at least where (1) the officials did not assault petitioner and (2) the officials did not stand by and watch McMillian assault petitioner and (3) the officials took no affirmative action to encourage McMillian to assault petitioner and (4) respondents in no way acquiesced in the assault and (5) the threat by McMillian against petitioner was ambiguous at best (J.A.120) and (6) the petitioner, although he wrote a note about being threatened, did not expect to be assaulted and conveyed no such expectation to respondents, and (7) the petitioner did not request or seek protective custody or any other protective measures; then petitioner had no right to bodily integrity within the meaning of the word "liberty" in the Due Process Clause.*

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* Another way of analyzing this is to say that the involvement of the officials was so minor that this was not action under color of state law and therefore not cognizable under § 1983.

B. If This Court Now Expands The Contours Of A Protected Liberty Interest To Include Petitioner's Claim, Respondents Are Entitled To Qualified Immunity.

If this Court should now determine that a prisoner's liberty interest includes assault by another inmate when the prison officials do not participate in, encourage or sanction that assault, and despite the fact that the "threat" was ambiguous and not considered a real threat by the petitioner himself, that broad definition of a liberty interest will be announced for the first time. That was not the clearly established law at the time of the incident. Respondents could not reasonably have been expected to anticipate these subsequent legal developments. Accordingly, they are entitled to qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982) ("government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 2738).

When respondents claimed qualified immunity in the district court, the court misinterpreted it as a claim of immunity on the grounds that the court, for the first time, was finding liability for mere negligence (J.A.93). That

is not the argument being made here at all. Respondents argue that, regardless of their state of mind, they could not have known that they would be violating petitioner's constitutional rights by failing to take immediate action in response to his note regarding the threat by prisoner McMillian. No prior case would have clearly established a liberty interest under those circumstances. Accordingly, respondents are entitled to qualified immunity.

In conclusion, respondents urge this Court to determine that petitioner had no constitutionally protected liberty interest at stake here. If the Court does find such an interest, it is such an expansion of the contours of a liberty interest as to entitle respondents to qualified immunity. In either event, judgment for respondents should be affirmed.

POINT II

EVEN IF PETITIONER HAD A LIBERTY INTEREST IN BEING FREE FROM A SINGLE ASSAULT BY ANOTHER PRISONER, RESPONDENTS' SIMPLE NEGLIGENCE DID NOT RISE TO THE LEVEL OF DEPRIVING PETITIONER OF THAT INTEREST.

The Fourteenth Amendment provides in pertinent part:

> nor shall any State deprive any person of . . . liberty . . . without due process of law . . . .

The court of appeals, having found that petitioner had a liberty interest within the meaning of the Fourteenth Amendment, held that respondents did not "deprive"

petitioner of that interest because respondents' actions were merely negligent.*

> When the only finding is that of mere negligence, as here, we cannot find the 'outrageousness' or abuse of official power that warrants raising the tortious conduct of the prison official[s] to the level of a deprivation of [a] constitutional right within the scope of §1983 [J.A.120].

Respondents urge this Court to affirm the judgment in their favor for the reason stated above.

Petitioner offers two arguments against affirmance on this ground. First, petitioner argues that "[*i*]*f* negligent loss of a prisoner's property constitutes a Fourteenth Amendment deprivation, certainly negligence causing injury to a prisoner's person constitutes a like deprivation" (Pb10; emphasis supplied). Second, petitioner argues that "[n]othing in any decision of this Court supports the conclusion of the court below that a deprivation of liberty must violate substantive due process to support §1983 relief" when petitioner alleges only a procedural due process violation (Pb13-Pb14). Regarding petitioner's first argument, comparing liberty and property interests, respondents agree that liberty is at least as great an interest as property, but assert further that neither a negligent taking of property nor a negligent taking of liberty constitutes a "deprivation" in the constitutional sense. Regarding petitioner's second argument, respondents agree that there need not be a violation of "substantive

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* This Court may determine that Cannon had no duty to follow up after he "followed the established procedure in directing Davidson to the proper officer" (J.A.120), and thus was not even negligent, a position which respondents have consistently maintained from the outset of this litigation.

due process" to permit recovery under §1983 for an alleged procedural due process violation, but petitioner has misinterpreted the decision below. The court held, instead, that in the absence of a deprivation of a "substantive right" (life, liberty or property), a court does not reach the procedural due process issue. In other words, there cannot be deprivation of liberty without due process if there was no deprivation of liberty at all.

A. Parratt v. Taylor Did Not Hold That Negligence Is Actionable Under 42 U.S.C. § 1983.

It is the position of petitioner, as it was the position of the district court, that *Parratt v. Taylor*, 451 U.S. 527 (1981), concerning the negligent loss of a prisoner's now-famous hobby kit, held that the negligent taking of property under color of state law is actionable under 42 U.S.C. §1983. It follows, petitioner and the district court say, that the negligent taking of liberty under color of state law is actionable under §1983 because liberty is an even greater interest than property. Respondents agree that liberty is at least as great an interest as property, but assert that the premise is faulty; *i.e. Parratt* did not hold that negligence was actionable under §1983.

In *Parratt*, a plurality acknowledged that it had "twice granted certiorari in cases to decide whether mere negligence will support a claim for relief under §1983," *id.* at 532, but each of these cases was decided on other grounds.* Thus, the Court asserted, "We, therefore, once

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* In *Procunier v. Navarette*, 434 U.S. 555 (1978), the Court held that *"regardless of whether the § 1983 complaint framed in terms of negligence stated a claim for relief [or not], the defendants would clearly have been entitled to qualified immunity and therefore not liable for damages."* *Parratt*, 451 U.S. at 533 (referring to *Procunier*; emphasis supplied). In *Baker v. McCollan*, 443 U.S. 137 (1979), the Count found no constitutional right in the first instance.

more put our shoulder to the wheel hoping to be of greater assistance to courts confronting such a fact situation than it appears we have been in the past." *Id.* at 533-534. The Court was helpful, but not in answering the question of whether negligence will support a claim for relief under §1983.

It is true that there is language in *Parratt* which, if taken out of context, may lead to the conclusion that the Supreme Court decided that negligence was actionable under §1983. The Court did say that "[n]othing in the language of §1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights." *Id.* at 534. (There is a long continuum between intent, referring to an intent to deprive a person of an interest, and negligence; so the absence of an intent requirement is not tantamount to the recognition of an action for mere negligence.) In addition, the Court did say that "the alleged loss, even though negligently caused, amounted to a deprivation." *Id.* at 536-537. However, neither of those statements was necessary to, or a part of, the actual holding in the case. The Court, in its own words, *held* "that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment." *Id.* at 542, citing *Bonner v. Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978). The existence of an adequate state remedy was readily apparent, and it meant that *even if* there were a deprivation of a property interest, that deprivation was not without procedural due process and therefore not in

violation of the Fourteenth Amendment. The *Parratt* Court did not need to decide the issue of whether negligence was actually sufficient to deprive Taylor of his property interest any more than it needed to decide the issue of whether the prison officials were even negligent at all. Analysis of both issues were bypassed because they simply did not matter, for there could be no constitutional violation anyway because of the existence of the state remedy.

If *Parratt* had held that negligence was actionable, as petitioner asserts, that would have been a long-awaited announcement on an issue of great interest across this country. Surely the Court would have indulged in a more extensive analysis rather than relegate it to dictum. Justice Powell, in his concurring opinion, recognized that when he stated, "[t]he Court passes over a threshhold question —whether a negligent act by a state official that results in loss of, or damage to, property constitutes a deprivation of property for due process purposes." *Id.* at 547. The plurality did not disagree with that. Nor did the plurality disagree with Justice Powell's conclusion that negligence is not actionable. The plurality simply did not reach that issue because it did not need to reach that issue given the existing state remedy that precluded a constitutional violation. *Cf. Hudson v. Palmer*, — U.S. —, 104 S.Ct. 3194, 3205 (1984) (even intentional deprivations of property do not violate the Fourteenth Amendment when the state provides an adequate post-deprivation remedy).

If there had been no adequate state remedy in *Parratt*, or if there had at least been an issue about that (as there is here; see Point III, *infra*); then the Court, having found a property interest, would have been squarely faced

with the question of whether negligence was sufficient to deprive Taylor of a property interest. But those were not the facts of *Parratt*. Now this Court, if it finds that petitioner had a liberty interest, is squarely presented with the question of whether respondents' negligence was sufficient to deprive petitioner of that interest and therefore support his claim for relief under §1983.

B. If Parratt v. Taylor Did Hold That Negligence Is Actionable Under § 1983, That Determination Should Be Disavowed.

The court of appeals based its determination that negligence will not support a claim under §1983 on its view of "the purpose and essence of §1983" (J.A.114). The legislative history of §1983, as reflected in prior decisions of the Court, support the Third Circuit's view, as do recent decisions in many other circuits.

An extensive review of the legislative history of §1983 appears in *Monroe v. Pape*, 365 U.S. 167 (1961). At the conclusion of that review, the Court determined that

> it is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. [*Monroe*, 365 U.S. at 180].

It might seem appealing to seize on the word "neglect" and conclude that negligence is cognizable under §1983. However, an analysis of the legislative history of §1983, as set forth in *Monroe* itself, reveals that "neglect" does not refer to "negligence." The legislators who enacted

the Civil Rights Act of which §1983 is a part were concerned about the failure of some states to provide equal protection of the law to all persons. *Monroe*, 365 U.S. at 175. This was not as a result of mere oversight or forgetfulness, typical synonyms for negligence, but because of an inability or unwillingness to enforce a state law. *Id.* at 176. It was this unwillingness that was referred to by the word "neglect." "Negligence," by contrast, "implies that although the actor has subjected the petitioner to unreasonable risk, he did not intend the harm or injury that in fact resulted." *Procunier*, 434 U.S. at 566. Prior to enactment of the Civil Rights Act the offending states *did* intend that certain persons, namely blacks, not receive equal protection of the laws. The states' unwillingness to enforce those laws was more akin to deliberate indifference than negligence.

Consequently, the *Monroe* Court concluded that the essential element of a §1983 action is abuse by a state official of his or her official position. *Monroe*, 365 U.S. at 172. It focuses on the misuse of power. *United States v. Classic*, 313 U.S. 299, 326 (1941).

> That provision was enacted to deter real abuses by state officials in the exercise of governmental powers. It would make no sense to open the federal courts to lawsuits where there has been no affirmative abuse of power, merely a negligent deed by one who happens to be acting under color of state law. [*Parratt*, 451 U.S. at 548-549; Powell, J., concurring].

The question of what type of conduct amounts to abuse of power, and, more particularly, whether negligence can ever rise to that level, "may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject

of a §1983 action." *Baker v. McCollan*, 443 U.S. 137, 139-140. For example, invidious discriminatory purpose is required to support a claim of racial discrimination under the Equal Protection Clause. *Washington v. Davis*, 426 U.S. 229 (1976). "Deliberate indifference to a prisoner's serious illness or injury" on the part of prison officials is required to support a claim of cruel and unusual punishment under the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97 (1976). The issue here is whether mere negligence will support a claim for relief under the Due Process Clause.

The Third Circuit is not alone in determining that negligence does not rise to the level of a constitutional deprivation under the Due Process Clause, even since the decision in *Parratt*. In *Daniels v. Williams*, 748 F.2d 229 (4th Cir. 1984) (*en banc*), *cert. granted*, February 19, 1985, a state prisoner claimed a violation of his liberty interest when he slipped and fell on a pillow and newspapers negligently left on a prison steps by a deputy sheriff. The court found that the facts were "not nearly aggravated enough" to support a claim of a constitutional violation. *Id.* at 230, n.1.

Likewise, in *Hull v. City of Duncanville*, 678 F.2d 582 (5th Cir. 1982), the Fifth Circuit stated:

> To subject a state agency to the federal Section 1983 remedy for deprivation of a federal constitutional or legal right, the conduct of the state officials or employees must be 'sufficiently egregious as to be "constitutionally" tortious.' *Williams v. Kelley*, 624 F.2d 695, 697 (5th Cir. 1980), *cert. denied*, 451 U.S. 1019, 101 S.Ct. 3009, 69 L.Ed.2d 391 (1981) [*Hull*, 678 F.2d at 584].

In *Jackson v. City of Joliet*, 715 F.2d 1200, 1206 (7th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 1325 (1984), the

Seventh Circuit held that actions of state defendants must be worse than negligent, and even worse than grossly negligent, in order to be actionable under §1983.

Even closer to the facts of the present case is *Wade v. Haynes*, 663 F.2d 778 (8th Cir. 1981), *aff'd on other grounds sub nom. Smith v. Wade*, 461 U.S. 30 (1983). There a state prisoner brought a civil rights action against three correctional officers and proved that he was beaten and sexually assaulted after he was wrongfully placed in an administrative cell with two other prisoners, one of whom the officials knew or should have known had been ordered separated from other inmates for his own safety and the safety of others. *Wade*, 663 F.2d at 780-781. The court concluded that

> there existed sufficient evidence to demonstrate that [the officer] recklessly and with callous indifference placed Wade into a dangerous situation. [*Id.* at 781].

That finding was necessary to sustain a verdict in favor of the prisoner because

> [i]n order to state an eight amendment claim resulting from an attack . . . a prisoner must show that prison officials 'deliberately deprived' him of his constitutional rights. Deliberate deprivation may result from actual intent to deprive him of his rights or from recklessness in ignoring known threats. [*Ibid.*].

In other words, if Wade had only been able to prove negligence, or even gross negligence, on the part of the officers, he would not have stated a claim under the Eighth Amendment. The result should have been no different if Wade had simply restyled his complaint to allege a violation of a liberty interest under the Fifth and Fourteenth Amendments. Likewise, in the present case, where petitioner had

no viable Eighth Amendment claim, "because [respondents] did not act with deliberate or callous indifference to [petitioner's] needs" (J.A.89), he should not be permitted to make an end run around that constitutional requirement by simply phrasing his claim in due process terms and then proving only negligence.

In light of the legislative history of §1983 seeking to protect people from official abuse and in light of determinations by various courts of appeals, even since *Parratt*, that there must be some reckless or deliberate wrongdoing by the defendant to amount to a deprivation under the Due Process Clause, respondents urge this Court to affirm the decision of the court below that negligence, at least in a due process case, is not actionable.*

To decide to the contrary is to disregard the legislative history of §1983, as reflected in prior decisions of the Court, and reasoned opinions of courts of appeals throughout the country. It will make the Fourteenth Amendment a font of tort law, which is precisely what the Court sought to avoid in *Parratt*. *See also Paul v. Davis*, 424 U.S. 693, 701 (1976). Indeed, the very scenario which the *Parratt* Court rejected as a viable §1983 action, namely an automobile accident with a state official, *Parratt*, 451 U.S. at 544, will now become viable if negligence is determined to be actionable. If someone dies, there may be a claim of deprivation of life. If someone is only injured, there may be a claim of deprivation of liberty (freedom from bodily intrusion). If someone's vehicle is damaged, there may

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* Although there is no issue of gross negligence in this case, this Court may wish to clarify that even gross negligence would not support a due process claim under § 1983. That would be consistent with the purpose of § 1983.

be a claim of deprivation of property. Indeed, there may be a claim of deprivation of two or all three of these interests. Furthermore, if the analysis in *Parratt* — that the existence of an adequate state remedy complies with the constitutional requirements of procedural due process — is *not* applicable to life and liberty interests, then the plaintiff in the automobile accident would apparently have a viable §1983 action. Even if the *Parratt* analysis, with respect to the effect of a state remedy on the due process issue, *is* applicable to life and liberty, it cannot be assumed that there will always be an adequate state remedy that will enable a court to dismiss the complaint on that ground; so once again the plaintiff in the automobile accident may have a viable §1983 action. The only way to avoid such an anomalous result is for this Court to clarify that to support a §1983 action under the Due Process Clause, a defendant's conduct must be worse than negligent.

POINT III

EVEN IF THE NEGLIGENCE OF THE STATE PRISON OFFICIALS DID DEPRIVE THE PETITIONER OF A LIBERTY INTEREST, THAT DEPRIVATION WAS NOT WITHOUT PROCEDURAL DUE PROCESS AND THEREFORE DID NOT VIOLATE THE FOURTEENTH AMENDMENT.

> The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished 'without due process of law.' [*Baker v. McCollan*, 443 U.S. 137, 145 (1979)].

The district court, having found that the prison officials "negligently deprived [petitioner] of his liberty interest in remaining free from physical assault," further

concluded that that deprivation was without procedural due process because "New Jersey provides [petitioner] no process whatsoever by which to pursue a remedy against the state or state officials for injuries inflicted by another prisoner. N.J. Stat. Ann. 59:5-2 (West 1982)." (J.A.91-J.A.92). The court of appeals did not reach the issue of procedural due process because it found no deprivation of a liberty interest in the first instance. Two of the circuit judges, however, in a concurring opinion, while agreeing that there was no deprivation of petitioner's liberty interest, stated that even if the negligence of the prison officials could constitute a deprivation of petitioner's liberty interest, that deprivation was not without procedural due process despite the existence and applicability of N.J. Stat. Ann. 59:5-2 (J.A. 123-J.A.124). That view is in accord with prior decisions of the Supreme Court. Thus, even if this Court determines that the negligence of the prison officials deprived petitioner of a liberty interest, respondents urge affirmance of the decision of the court of appeals because such a deprivation was not without due process of law.

To determine whether the procedural due process requirements of the Constitution have been met, the first question is whether the deprivation of petitioner's liberty interest was authorized by an established state procedure or was the result of random and unauthorized acts by the state employees. *Parratt*, 451 U.S. at 538-541. If the acts of the prison officials were authorized by an established state procedure, due process requires a predeprivation notice and hearing. *Id.* at 538. On the other hand, if the acts were random and unauthorized, so that the state could not predict when the loss would occur, then all that is re-

quired is "some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities." *Id.* at 541. It is undisputed here that the acts of the two prison officials were not authorized by state procedure. Instead, it is agreed that their acts, or failures to act, were random and unauthorized. They were mere oversights by two individual state employees. Therefore, as in *Parratt*, "[i]t is difficult to conceive of how the state could provide a meaningful hearing before the deprivation takes place." *Parratt*, 451 U.S. at 541. Petitioner concedes as much (Pb22). Thus, the issue is whether there was an adequate post-deprivation remedy to redress the deprivation of petitioner's liberty interest and thus satisfy the due process requirement. *See Parratt*, 451 U.S. at 542, citing with approval *Ingraham v. Wright*, 430 U.S. 651, 682 (1977).

Petitioner argues that because of the immunity provided by N.J. Stat. Ann. 59:5-2(b)(4)* to public entities and public employees for injuries inflicted by one prisoner upon another prisoner, he "does not possess any state claim whatsoever against respondents for the serious injuries that he received as a result of their proven negligence" and, thus, has suffered a deprivation without due process of law (Pb22). Respondents believe that, despite the immunity, the requirements of procedural due process have been met here; so there has been no violation of the Fourteenth Amendment.

Although *Parratt* concerned a deprivation of property, not liberty, the Court's determination — that the existence

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* *N.J. Stat. Ann.* 59:5-2(b)(4) provides:

> Neither a public entity nor a public employee is liable for . . . any injury caused by . . . a prisoner to any other prisoner.

of an adequate state remedy complies with the constitutional requirements of procedural due process — should be equally applicable to deprivations of liberty. Since state action in the deprivation of either of these interests is not complete for constitutional purposes unless the deprivation is without due process, the process available in a state remedy that is deemed adequate would necessarily result in a determination that there was no constitutional violation. Thus, the adequacy of the state remedy is a crucial question.

The burden is on the petitioner to prove that the state remedy is not adequate for procedural due process purposes. *Vicory v. Walton*, 721 F.2d 1062, 1063 (6th Cir. 1983) *reh'g. denied*, 730 F.2d 466 (6th Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 125 (1984) (interpreting *Parratt v. Taylor*, 451 U.S. 527 (1981)). Petitioner concedes as much (Pb23). However, petitioner argues that the existence of the immunity renders the state remedy inadequate without any analysis of that immunity. Surely there is no such *per se* rule. If there were, the Supreme Court would not repeatedly acknowledge, as it has for more than a century, the viability of absolute judicial immunity.

> Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial discretion, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher*, 13 Wall. 335, 20 L.Ed. 646 (1872). [*Pierson v. Ray*, 386 U.S. 547, 554-555 (1967)].

Indeed, unlike the immunity protecting respondents here, the judicial immunity doctrine is not even limited to negligent conduct. "This immunity applies even when the judge is accused of acting maliciously and corruptly." *Id.* at 554.

There is a sound reason for establishing and preserving judicial immunity. It "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Ibid.* (Citations omitted). The Court in *Pierson* expressly held that the enactment of §1983 did not abolish judicial immunity. A similar decision was rendered by the Court in *Tenney v. Brandhove*, 341 U.S. 367 (1951), regarding the immunity of legislators for acts within the legislative role. Consequently, it is clear that an immunity does not automatically violate the Due Process Clause.

Instead, "[t]he touchstone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia*, 129 U.S. 114 (1889)." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). This Court should decide that if the immunity provided by statute is not arbitrary, then it does not violate due process. Circuit Judges Garth and Weis, in their concurring opinion below, proposed the following balancing test:

> If New Jersey, as it has here, provides immunity against Davidson's claim, then an appropriate due process analysis should be concerned with whether the state's interest in protecting its prison officials in such a situation outweighs Davidson's interest in having available a monetary cause of action against prison officials for merely negligent conduct [J.A.124].

The state has an obvious interest in limiting the tort liability of those who operate the prisons. It has determined that liability should not be imposed upon a prison official whose negligence results in one prisoner assaulting another.

> While it is necessary to provide supervision, the decision to do so for the purpose of preventing inter-prisoner injuries should not be threatened with tort liability nor should the actions of prison guards in reacting to situations which may give rise to such injuries. [Comment, N.J. Stat. Ann. 59:5-2(b)(4)].

The courts should not try to second-guess the legislature's decision to immunize those who, faced with a difficult situation, make a decision which, because of mere forgetfulness, ultimately results in injury. Specifically, Cannon had known petitioner for years. Based on that relationship, he interpreted petitioner's note as not seeking protection, an interpretation confirmed at trial by petitioner himself. As a result Cannon, as Assistant Superintendent, forwarded the note to Internal Affairs and turned his attention to other matters. Should the courts second-guess Cannon's decision or the legislature's determination to protect such decision-making? Similarly James, when he received the note, made the decision to continue with a crisis he was then dealing with, rather than to investigate a note about which, the court found, no urgency had been conveyed. Ultimately, James forgot about the note, but should the courts second-guess his decision about priorities or the legislature's determination to protect priority-setting? The decisions made by Cannon and James are the very types of decisions which prison officials are forced to make innumerable times, day in and day out. If they are not given immunity for these decisions, even when the ultimate result is inter-prisoner injury, there will be a severe chilling effect on their decision-making. So much time will be consumed in analyzing and re-analyzing each decision, important tasks may go undone. Society entrusts the care of prisoners, those who have broken the

law, to prison officials. If the conduct of those officials is no worse than negligent, then an immunity to shield them from liability in order to preserve their ability to run the prison is surely not arbitrary. It is every bit as rational as the even broader immunities that protect judges and legislators and others, and for virtually the same reasons.

Given the rationality of the immunity statute, the balancing of interests must favor the state officials. Thus, as Circuit Judges Garth and Weis concluded, petitioner has had all the process that is due (J.A.126). To hold otherwise is to deprive the states of the right to fashion their own rules of tort law as long as those rules are not arbitrary or irrational.

A similar analysis was used in *Martinez v. California*, 444 U.S. 277, 282 (1980). The Court scrutinized a California statute which provides:

> Neither a public entity nor a public employee is liable for: (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release. [Cal. Gov't. Code Ann. 845.8(a)].

That statute provided the basis for a very similar New Jersey statute that is a subsection of the same section of the New Jersey Tort Claims Act as is the provision involved in the present case.

In *Martinez* a 15 year old girl was murdered by a parolee. Her survivors filed a §1983 action in state court, raising two federal questions. First, they alleged that the statute violated the Fourteenth Amendment because it deprived their decedent of life without due process of law. Such an issue is not before this Court here because pe-

titioner did not challenge the constitutionality of N.J. Stat. Ann. 59:5-2(b)(4), as the court of appeals correctly noted (J.A.121). Nevertheless, the decision of the *Martinez* Court on this issue is instructive. The Court, in rejecting plaintiff's claim, noted that "[t]he statute neither authorized nor immunized the deliberate killing of any human being" but "merely provides a defense to potential state tort law liability." *Id.* at 281. The same is true here. The New Jersey statute does not authorize nor immunize the deliberate killing, or even the deliberate infliction of bodily injury, on another. It merely provides immunity from liability for state employees when, as a result of their negligent conduct, one prisoner assaults another.

The *Martinez* Court acknowledged that the defense in that case "may have encouraged members of the parole board to take somewhat greater risks of recidivism in exercising their authority to release prisoners than they otherwise might," but that was simply a legislative decision that might have an incremental impact on the already existing reality of recidivism. Likewise, the immunity here might arguably encourage prison officials to carry out their duties without stopping to analyze every decision made concerning a prisoner's note about a threat, but that is simply a legislative decision that might have an incremental impact on the already existing reality of assault by prisoners on other prisoners. In rejecting plaintiff's claim that the proper test required a compelling state interest, the Court noted that "the Legislature has broad powers to control governmental tort liability limited only by the rule it not act arbitrarily." *Ibid.*, n.6. Applying a rational relationship test, the Court upheld the constitutionality of the statute. "Whether one agrees or disagrees with Cali-

fornia's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that it rationally furthers a policy that reasonable lawmakers may favor." *Id.* at 283.

As noted previously, petitioner has never challenged the constitutionality of the New Jersey statute. However, if he had, it is clear that the statute would have been found to be constitutional. In general, the Supreme Court has historically favored an interpretation of legislation which supports its constitutionality. *Screws v. United States*, 325 U.S. 91, 98 (1945). More specifically, the decision in *Martinez* would support a finding of constitutionality here.

The second federal question addressed by the *Martinez* Court, which parallels the claim here, was whether the actions of the parole official in releasing the murderer deprived decedent of life without due process of law. Since the *Martinez* Court found no deprivation of a life interest in the first instance, the Court expressly did not reach the issue of whether, if there had been a deprivation, that deprivation would have been without due process of law because of the immunity* However, it would be fundamentally inconsistent to rule that a statute is constitutional but denies due process.

Two years after *Martinez*, the determination that a State is free to create substantive defenses or immunities was reaffirmed in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). Although *Logan* differs from the present case because plaintiff challenged an established

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* For the same reason, this precise issue was raised and not decided in *Daniels v. Williams*, 748 F.2d 229, 232 (4th Cir. 1984) *(en banc)*, *cert. granted*, February 19, 1985, and set for oral argument with this case.

state procedure, not a random act, the Court's analysis of due process requirements is helpful. A civil litigant is not necessarily entitled to a hearing on the merits. *Id.* at 437.

> What the Fourteenth Amendment does require, however, is 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner,' *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965) (emphasis added) 'for [a] hearing appropriate to the nature of the case,' *Mullane v. Central Hanover Tr. Co., supra*, 339 U.S. at 313, 70 S.Ct. at 656. *Boddie v. Connecticut*, 401 U.S. at 378, 91 S.Ct. at 786. [*Logan*, 455 U.S. at 437].

Petitioner could have filed a tort action against the two prison officials in state court. The fact that he did not avail himself of that opportunity is of no constitutional significance. If he had, the officials would have filed an answer to the complaint, asserting as a separate defense the immunity provided by N.J. Stat. Ann. 59:5-2(b)(4) or, in the alternative, would have filed a motion to dismiss on the basis of that immunity. Ultimately the applicability of the immunity would have been before the state court in a motion to dismiss or a motion for summary judgment. If, as has been found here, the officials were negligent, not guilty of willful or intentional misconduct, then the immunity would apply. Petitioner's complaint would, it is conceded, have been dismissed. Respondents argue that that would have been all the process that was due to petitioner.

Respondents urge this court to adopt the reasoning in *Martinez* and in the concurring opinion below. Since petitioner has never even alleged, much less attempted to prove, that the immunity statute is arbitrary or irrational, petitioner has not sustained his burden of proof that his deprivation was without due process of law. Thus, he has

not established a violation of the Fourteenth Amendment. The judgment in favor of respondents should be affirmed.

CONCLUSION

For all of the foregoing reasons, respondents Joseph Cannon and Robert James submit that the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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